Supreme Court, U.S.
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No. 92-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN RE: PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,

Debtor

MARTIN ROCHMAN, EDWARD KAUFMAN AND ROBERT C. RICHARDS,

Petitioners

v.

NORTHEAST UTILITIES SERVICE COMPANY, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS NORTHEAST UTILITIES SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether The United States Court Of Appeals For The First Circuit Correctly Applied Established Mootness Doctrine To The Circumstances Of This Case.

LIST OF PARTIES

Appellees state that Northeast Utilities Service Company is a wholly owned subsidiary of Northeast Utilities, a public utility holding company. Northeast Utilities Service Company has no subsidiaries. The following subsidiaries of Northeast Utilities have issued shares or debt securities to the public:

The Connecticut Light and Power Company
Holyoke Water Power Company
Western Massachusetts Electric Company
North Atlantic Energy Corporation
Public Service Company of New Hampshire

Other utilities with publicly-held securities in which Northeast Utilities and/or Public Service Company of New Hampshire have an interest that Rule 29.1 of the Rules of the Supreme Court of the United States may require to be disclosed are:

Connecticut Yankee Atomic Power Company
Maine Yankee Atomic Power Company
Vermont Yankee Nuclear Power Corporation

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STATEMENT OF THE CASE

A. Introduction and Summary

Petitioners are three shareholders who objected to the plan of reorganization that enabled New Hampshire's largest electric utility, Public Service Company of New Hampshire ("PSNH"), to emerge from bankruptcy. They ask this Court to

allow them to force other investors to join their speculative and idiosyncratic crusade by undoing the complex financial, regulatory, and legislative actions that made PSNH's Chapter 11 reorganization possible. Were petitioners to succeed, they promise to lead their newly conscripted army of third party investors into protracted rate litigation, the results of which petitioners acknowledge they cannot guarantee, in the hope that PSNH will ultimately realize more value than provided for under the confirmed and fully implemented Chapter 11 plan.

Petitioners ignore the fact that the sources of the more than $2,300,000,000 required to bring PSNH out of bankruptcy did not invest in the risk of that litigation.[1] The United States Court of Appeals for the First Circuit did not, however, ignore that reality. Rather, because the reorganization could not be set aside without harming the thousands who had acted in justifiable reliance on the unstayed order of the bankruptcy court and because petitioners had failed to exhaust all opportunities to prevent the plan from being implemented, the First Circuit dismissed petitioners' appeal as moot.

Petitioners want this Court to reverse the First Circuit and to hold that the bankruptcy court was wrong to confirm the reorganization plan. To secure this ruling, petitioners suggest that the Court accept review of a case that is unique in its factual context but ordinary in its insistence that litigants follow established rules. Petitioners ask the Court to replace that customary principle with a new standard that would excuse

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[1] Indeed, petitioners' fellow shareholders in PSNH, for whose interests petitioners claim to speak, also did not want to risk that litigation. The common shareholders of PSNH, like all other impaired classes except the holders of the most junior warrants, accepted the reorganization plan by the requisite majority under § 1126(d) of the Bankruptcy Code, 11 U.S.C. § 1126(d) (1988).

litigants' noncompliance if "[they] had no reason to believe" that they could prevail by following the required course. (Petition for Writ of Certiorari ("Pet.") at 52.) In addition, petitioners request that this Court divest the federal courts of appeals of the authority to consider equitable principles when determining whether effective equitable relief remains possible. When evaluating the equity of granting relief, petitioners urge this Court to instruct the lower courts that the mere assertion of an allegedly constitutionally-based claim outweighs the interests of thousands of individuals and entities who have acted in reliance on an unstayed bankruptcy court order. Finally, petitioners ask this Court to enshrine their utility ratemaking theories in constitutional law, without any record to support their claims and without even the benefit of a decision on the merits from the court below.

Petitioners offer no reason for the Court to go to such extraordinary lengths. Petitioners' claim is, in their own words, "unique." (Pet. at 54.) The rules of law on which the First Circuit relied are clearly established and followed in all the lower federal courts; petitioners make no claim of any conflict among the circuits. The rules of law petitioners advocate have not been adopted by any court; petitioners do not suggest otherwise. In short, petitioners have identified no reason for this Court to review this case.

B. Relevant Facts and Proceedings

PSNH filed for bankruptcy on January 28, 1988. That filing created economic and planning uncertainty, the termination of which became a primary policy goal of the State of New Hampshire. *See* N.H. Rev. Stat. Ann. § 362-C (Equity Publishing Corp. 1984 & Supp. 1990).[2] Almost two years later,

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[2] N.H. Rev. Stat. Ann. 362-C:1 is entitled "Declaration of Purpose and Findings" and states a legislative finding, *inter alia*, that "[t]he bankruptcy of

(*Continued*)

Northeast Utilities Service Company, on behalf of its parent, Northeast Utilities, PSNH, the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities and Communications, Inc. and Shearson Lehman Hutton Inc., filed a plan of reorganization. That plan embodied a two-step reorganization process. In the first step, distributions of cash and securities would be made to claimants in the bankruptcy and PSNH would emerge from bankruptcy as an independent company subject to a merger agreement with Northeast Utilities. In the second step, which could take place only after various federal and state regulatory approvals were obtained, PSNH would be merged into a Northeast Utilities subsidiary.

The keystone of the reorganization plan was a Rate Agreement with the State of New Hampshire[3] that assured PSNH of rate increases during each of the next 7 years, resolved the issues surrounding the ratemaking treatment of PSNH's investment in the Seabrook nuclear plant and provided PSNH with other guarantees that limited its future financial risk.[4] (Petition Appendix ("Pet. App.") at 95a-96a.) The Rate

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(*Continued*)

the state's largest electric utility, Public Service Company of New Hampshire, has threatened the adequacy, reliability and cost of electric service."

3 The Rate Agreement was negotiated by the Governor and Attorney General of New Hampshire and then approved by the legislature. *See* N.H. Rev. Stat. Ann. § 362-C.

4 Included in the Rate Agreement is a fuel and purchased power adjustment clause ("FPPAC"), which adjusts customer charges to reflect changes in fuel and purchased power costs and also relieves PSNH of the risk of several major contingencies, including the premature retirement of Seabrook. The FPPAC was and continues to be crucial in assuring the financial stability of reorganized PSNH.

Agreement allowed the Northeast Utilities plan to provide $2.3 billion in distributions to the creditors and owners of PSNH. (Pet. App. at 61a.) No other plan proposed during the six-month period in which any interested party was allowed to propose a plan of reorganization[5] offered as much value.

After six days of hearings, on April 20, 1990, the bankruptcy court confirmed the reorganization plan proposed by Northeast Utilities and others. Petitioners participated actively in the confirmation hearings as opponents of the plan. Indeed, as the bankruptcy court noted in its extensive memorandum opinion overruling petitioners' objections, (Pet. App. at 61a-169a), most of the time spent in the confirmation hearings focused on petitioners' claims. (Pet. App. at 64a.)

While their appeal from the confirmation order was pending in the district court, petitioners moved to stay the confirmation order pending appeal. The bankruptcy court denied that motion after a hearing. (Pet. App. at 6a-8a) (citing *In re Public Serv. Co.*, 116 B.R. 347 (Bankr. D. N.H. 1990)). Petitioners never appealed the order denying the stay. (Pet. App. at 8a.)[6]

The United States District Court for the District of New Hampshire affirmed the decision of the bankruptcy court on August 22, 1991. (Pet. App. at 34a.) The First Circuit dismissed

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5 The bankruptcy court ended PSNH's exclusive right to propose a plan of reorganization by Amended Memorandum Opinion dated March 22, 1989. *In re Public Serv. Co.*, 99 B.R. 155 (Bankr. D. N.H. 1989).

6 Petitioners did attempt to file a new motion to stay execution of the confirmation order pending appeal with the district court, but were not allowed to file that motion because it did not conform to a local rule of the court. Petitioners neither corrected their error and refiled their motion nor appealed the action of the district court. (Pet. App. at 8a.)

petitioners' appeal of that decision as moot on May 6, 1992. The court of appeals found petitioners' claim moot because by the time the case reached that court, the first step of the reorganization plan had already taken place.[7] (Pet. App. at 20a-27a.) Petitioners seek review of the action of the First Circuit.

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[7] Step one of the reorganization plan occurred on May 16, 1991, shortly after the New Hampshire Supreme Court affirmed the approval of the Rate Agreement by the New Hampshire Public Utilities Commission. *See Appeal of Richards*, 134 N.H. 148, 590 A.2d 586, *cert. denied*, ____ U.S. _____, 112 S. Ct. 275 (1991). Petitioners acknowledge that they knew in advance that the reorganization plan would be implemented when the New Hampshire Supreme Court decision was issued. (Pet. at 31.) The complex financial arrangements executed in step one of the reorganization plan included, *inter alia*, the following:

> issuance of PSNH first mortgage bonds aggregating $342,000,000 in an underwritten public offering; issuance of 5,000,000 shares of PSNH preferred stock at a par value of $25 per share; . . . loans from numerous banking institutions amounting to over $1 billion, guaranteed by the New Hampshire Industrial Development Authority . . . [exchanges for replacement securities of] approximately 32,000,000 shares of PSNH common stock, notes aggregating $205,000,000, and more than 8,000,000 certificates evidencing contingent rights to acquire . . . warrants to purchase common stock in the emergent entity.

(Pet. App. at 21a n.14, 22a.)

Step two of the reorganization plan, the merger of PSNH into a subsidiary of Northeast Utilities and cash out of the PSNH common stockholders took place on June 5, 1992, after the decision below.

ARGUMENT

The Court Of Appeals Correctly Applied Existing Case Law To The Circumstances Of This Case When It Dismissed Petitioners' Appeal As Moot

Because a federal court exercising bankruptcy jurisdiction acts as a court of equity, *see In re Lafayette Radio Elecs. Corp.*, 761 F.2d 84, 92 (2d Cir. 1985) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) and citing *Dugas v. American Surety Co.*, 300 U.S. 414 (1937)), equitable considerations properly play a major role in determining whether it is possible for an appellate court to grant relief on appeal in a bankruptcy matter. If granting relief would not be equitable because of changes in circumstances in reliance on the order under appeal, a court of appeals sitting on a bankruptcy matter cannot take effective judicial action and the appeal must be dismissed as moot. *See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 841 F.2d 92, 93 (4th Cir. 1988)("the appeal [was] moot, presenting only an academic question, for, though the [plaintiff's] objections be sustained, the court cannot equitably provide any remedy"); *In re Crystal Oil Co.*, 854 F.2d 79 (5th Cir. 1988)(appeal dismissed because "comprehensive change of circumstances" rendered requested relief "plainly inequitable"); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). The federal courts uniformly agree on this settled principle of law.[8]

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[8] Petitioners urge this Court to require the courts of appeals to find that relief would be "impossible" to grant before dismissing an appeal from a bankruptcy order. They contend it is not appropriate for the courts of appeals to dismiss on the basis of mootness when they conclude that the harm caused by granting the relief requested by appellants would outweigh any benefit and is therefore inequitable. (Pet. at 49-56.) A court of equity, however, cannot

(*Continued*)

The two traditional equitable considerations on which the court of appeals relied fully justify its conclusion. First, as the First Circuit explained, extensive and complex financial arrangements involving many thousands of individuals and entities and billions of dollars have been executed in reliance on the unstayed order of the bankruptcy court. (Pet. App. at 25a-26a.) Petitioners' challenge to the approval by the bankruptcy court of the Rate Agreement between PSNH and New Hampshire strikes at the cornerstone of the structure that supports all of those transactions. (*See* Pet. App. at 4a-5a.) As the First Circuit noted, "an appellate reversal of the substantially consummated reorganization plan in the present case would 'creat[e] . . . a *nightmarish* situation' . . . and make reconstructive relief extremely improbable." (Pet. App. at 24a-25a)(emphasis added).

Petitioners respond that no one who put new money into PSNH would be hurt by the unraveling of the Rate Agreement because, they assert, the chances are "extremely good" that PSNH would ultimately come out ahead from the resulting years of litigation over its rates. (Pet. at 40.) Petitioners also acknowledge, however, that they cannot guarantee that outcome. (Pet. at 40, 55.) Thus, petitioners offer the new investors in PSNH, both those who put their funds directly into the

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(*Continued*)

award relief that is not equitable. *See Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912) (citing *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19, 35 (1900)). Therefore, petitioners' attempted distinction between situations where appellate relief is "impossible" and situations where appellate relief would be inequitable must be rejected.

Despite petitioners' suggestion to the contrary, the holding in *In re Roberts Farms, Inc.*, is fully consistent with this reasoning. *See* 652 F.2d at 797-98.

reorganization and those who have since purchased an interest in PSNH on the public markets, the chance to join them in speculating on the outcome of litigation.[9]

The investors, however, made their decision to invest in a reorganized PSNH that had resolved the very uncertainties petitioners seek to revive. Whether or not petitioners' strategies might ultimately prove correct, implementing them would effect a fundamental change in the nature of the investment made in reliance on the unstayed bankruptcy court order.[10] That would be inequitable.[11]

The second factor on which the First Circuit relied is the fact that petitioners did not diligently seek to stay the effectiveness of the confirmation order, an action which would

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9 The highly speculative nature of petitioners' scheme is best demonstrated by their repeated suggestions that rather than take the risk of rate litigation, the State of New Hampshire would buy PSNH at a higher value than the reorganization plan placed on PSNH. (Pet. at 22, 40, 56.) In other words, petitioners hope to profit by creating a crisis in New Hampshire that the State would pay dearly to resolve. The State, however, has shown no interest in purchasing PSNH. (*See* Pet. at 24 n.4.)

10 Petitioners blithely assume that the financial institutions which loaned several hundred million dollars to finance the reorganization would not be concerned about the invalidation of the Rate Agreement. (Pet. at 37-38.) The financial institutions, however, included the invalidation or modification of the Rate Agreement as an event of default, (Pet. at 26a n.16), and petitioners' belief that the lenders would not trigger the default provisions is, at best, a wild guess.

11 Remarkably, petitioners claim that "it is impossible to determine at this time whether anyone involved in the case after the Confirmation Order is reversed would object to it." (Pet. at 50.) On the contrary, opposition to such reversal is a foregone conclusion. Apparently, petitioners have overlooked the fact that respondent Official Committee of Equity Security Holders, not petitioners, speaks for the PSNH shareholders.

have limited the harm to third parties that reversal on appeal would now inflict.[12] Petitioners acknowledge that they did not do all they could have to seek a stay, (Pet. at 27-30), and they also admit they were aware of the case law requiring them to do so. (Pet. at 29.) Petitioners urge, however, that they should be excused from that requirement because they did not believe that they would have succeeded in obtaining a stay. (Pet. at 52-53.)

Petitioners' proposal that this Court make the litigants the judges of their own need to follow established procedures is ludicrous. It does not, of course, have any support in the decided cases; its disruptive impact in all areas of the law can only be imagined.

In short, the First Circuit properly applied established law to the facts before it. Petitioners have shown no reason why this Court should review the decision below.[13]

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[12] In the classic language of equity, petitioners do not come to this Court with clean hands.

[13] Petitioners' request that this Court take the extraordinary step of considering their attack on the merits of the bankruptcy court's order despite the fact that the First Circuit did not reach the merits has even less to commend it. Petitioners' self-proclaimed expertise, (*see* Pet. at 16-25), does not provide an adequate record on which this Court should reconsider its recent refusal to constitutionalize the "prudent investment" standard as the basis for state regulation of utility rates. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

CONCLUSION

For the reasons set forth above, respondents request that the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

Respondents, NORTHEAST UTILITIES SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

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